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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 318.

JULIAN LANE, ET AL.,
Petitioners,

v.

VOLUSIA COUNTY KENNEL CLUB, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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ARGUMENT.

The Decision Below Was Based upon an Independent Ground of State Law.

This case involves a unique Florida situation. The state statute which was struck down by the Florida Supreme Court levied a peculiar kind of graduated tax on

betting at Florida dog racing tracks. Because of the very special importance of gambling revenue in Florida and its relation to Florida public finance the type of pari-mutuel betting tax construed in this case has no exact parallel, so far as counsel has been able to determine, in any other state in the union.

The petitioners concede that if the judgment of the Florida Supreme Court is based upon an independent state constitutional ground as well as a federal ground the Petition for Certiorari must be denied under the rule laid down in *Lynch* v. *New York ex rel. Pierson* (1934), 293 U. S. 52. In the Lynch case this Court held that a decision by a state court, holding a state statute invalid because repugnant to provisions in both the federal and state constitutions rests upon an adequate nonfederal ground and will not be reviewed by this Court. This rule was affirmed again in *Minnesota* v. *National Tea Co.* (1940), 309 U. S. 551, 554.[1] See also *Fox Film Corp.* v. *Muller* (1935), 296 U. S. 207; *City of New York* v. *Central Savings Bank* (1939), 306 U. S. 661; *Herb* v. *Pitcairn* (1945), 324 U. S. 117.

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[1]*Morehead* v. *New York ex rel. Tipaldo* (1936), 298 U. S. 587 relied on by petitioners is not inconsistent with this rule. In the statement of the proceedings in the Morehead case this Court was careful to point out that the remittitur of the lower court certified that the federal constitutional question was presented and "necessarily" passed upon. Unlike the Florida court the New York court cited no state decisions in support of its ruling and it seems clear that by the use of the word "necessarily" and from an examination of the opinion of the Court of Appeals of New York and of the remittitur that the state court did not rest its final conclusion and decision upon the repugnancy of the state statute on the state constitution, but passed the state ground and rested its decision solely upon the invalidity of the statute under the Fourteenth Amendment to the Federal Constitution. As a result the jurisdiction of this Court in the Morehead case may be sustained under the rule of *Grayson* v. *Harris* (1925), 267 U. S. 352.

It clearly appears that the decision of the Florida Supreme Court was based upon an independent ground of state law which had been present in this case from the outset and which was urged at every stage of the proceedings.

The complaint alleged that the state statute involved in this case violated Section 1 of the Declaration of Rights of the Florida Constitution[2] (R. 13) and the petitioners specifically denied this allegation (R. 27-8).

The Florida Supreme Court in each of its three opinions squarely held that this special dog track tax violated the Florida Constitution as well as the Federal:

Original Opinion:

> "The effect of the attempted imposition of the tax is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States and the Declaration of Rights of the Constitution of the State of Florida." (R. 296)

On Petition for Rehearing:

> "What we held, and now repeat, was that any attempted tax upon a new classification based solely on the amount of the gross receipts of a business heretofore recognized by the Legislature as being a legitimate business constituted a denial of the Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States and the Declaration of Rights of the State of Florida." (R. 330-1)

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[2]"All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing happiness and obtaining safety." Section 1 of the Florida Declaration of Rights.

On Petition to Recall the Mandate:

"The majority opinions do not immunize the dog tracks from further taxation, but did strike down the 1953 tax because it was a graduated gross receipts tax (as distinguished from a regulatory measure under the state police power) of a type consistently invalidated by this court over a period of many years. We have held that this tax and others of a kindred nature violated the Constitution of this sovereign state. See *State ex rel. Lane Drug Stores* v. *Simpson*, 122 Fla. 582, 166 So. 227; *State ex rel. Adams* v. *Lee*, 122 Fla. 639, 166 So. 249; *City of DeLand* v. *Florida Public Service Company*, 119 Fla. 804, 161 So. 735; *State ex rel. Cole* v. *Keller*, 129 Fla. 276, 176 So. 176; *State ex rel. McKay* v. *Keller*, 140 Fla. 346, 191 So. 542; and *City of Tampa* v. *Tampa Times Co.*, 153 Fla. 709, 15 So. 2d 612. We also held that the tax here involved violated the Constitution of the United States, under the authority of *Stewart Dry Goods Company* v. *Lewis*, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054; *Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U. S. 32, 57 S. Ct. 56, 81 L. Ed. 22." (R. 338)

Of the six Florida cases cited above by the Supreme Court and relied upon as controlling the state constitutional question in the case at bar, in only three was a federal constitutional question passed upon. The court in the other three cases cited held the state statute invalid on state grounds alone. And the three which did pass upon a federal question also held that the statute violated the Florida Constitution. These three cases were decided by the Florida Supreme Court almost twenty years ago and have been settled principles of state constitutional law ever since.

These six Florida cases clearly illustrate the error of the petitioners' contention that the holding of the Florida

Supreme Court was not based on "any separate and independent construction of the State constitution."[3]

Leaving the three Florida cases aside which were based wholly on state grounds can it be logically argued that a court renounces its independence when in construing a statute it reaffirms three of its own decisions which were influenced by the views of a court of another jurisdiction construing a similar statute? Suppose the Florida Supreme Court in the three cases listed above in which federal decisions are discussed had instead cited decisions of the California Supreme Court. Could it be seriously argued that the Florida court had not made an "independent" decision on its constitution merely because the Florida cases it relied on cited California authority? Every common law court is guided in its decisions by precedents from other jurisdictions in deciding questions arising under its state law. As Mr. Chief Justice Hughes pointed out in his dissenting opinion in *Minnesota* v. *National Tea Co., supra*:

> "That the state court may be influenced by the reasoning of our opinions makes no difference. The state court may be persuaded by majority opinions in this Court or it may prefer the reasoning of dissenting judges, but the judgment of the state court upon the application of its own constitution remains a judgment which we are without jurisdiction to review. Whether in this case we thought that the state tax was repugnant to the Federal Constitution or consistent with it, the judgment of the state court that the tax violated the state constitution would still stand."

To follow petitioners' argument to its logical conclusion the only state court decision that would be based on an "independent state ground" would be one which ignored everything ever decided by any other court.

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[3]Page 7 of the Petition.

For the petitioners to bring their petition within the jurisdiction of this Court they must show the Florida decision rests wholly on federal grounds. Any doubt is resolved against the exercise of jurisdiction.[4]

In the case at bar—not only is there no explicit statement by the Florida Supreme Court that it held the tax invalid solely because of violation of the Federal Constitution but on the contrary an explicit statement that the law was held invalid for violation of the State as well as the Federal Constitutions.

CONCLUSION.

The decision below was correct and clearly based on state as well as federal grounds. We respectfully submit the Petition for Certiorari should be denied.

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[4]*Klinger* v. *Missouri* (1872), 13 Wall. 257, 263; *Eustis* v. *Bolles* (1893), 150 U. S. 361, 367; *Dibble* v. *Bellingham Bay Land Company* (1896), 163 U. S. 63, 69; *Allen* v. *Arguimbau* (1905), 198 U. S. 149; *Memphis Natural Gas Company* v. *Beeler* (1942), 315 U. S. 649.